Bar Malaysia v Index Continent Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22 NCVC-1000–10 OF 2011
AMELIA TEE ABDULLAH J
20 JANUARY 2012

Civil Procedure — Injunction Interlocutory injunction — Application for — Answers-in-law scheme — Offering services of advocates and solicitors — Whether there were serious issues to be tried — Balance of convenience — Whether balance of convenience and justice leaned more towards granting — Whether damages adequate remedy — Whether suitable to grant in present case

Legal Profession — Answers-in-law scheme — Offering services of advocates and solicitors — Whether services offered by defendant contravened Legal Profession Act 1976 ('LPA') — Whether plaintiff lack substantive locus standi to bring this suit — Whether plaintiff's action tantamount to enforcing penal sanction under LPA which right was reserved to Attorney General — Whether plaintiff acted ultra vires the objects and powers granted to it under the LPA — Whether plaintiff suffered loss or injury on its own — Legal Profession Act 1976 ss 37 & 42(1)(g)

The plaintiff had applied, inter alia, for an injunction against the defendant in connection with the latter's activities in promoting its prepaid legal services on a subscription basis by the name of 'answers-in-law'. Earlier, the court had granted an ad interim injunction to restrain the defendant from continuing to advertise, promote or otherwise communicate howsoever its purported provision of prepaid legal services ('the impugned services'), from carrying and/or engaging in the provision of the impugned services to members of the public and from directly or indirectly soliciting clients, members or subscribers for its answers-in-law scheme in breach of s 37 of the Legal Profession Act 1976 ('LPA'). Despite the above ad interim injunction, the defendant was still actively and resolutely sending out electronic mails to law firms and individual lawyers on the impugned services. Hence, the present action by the plaintiff to restrain the defendant from advertising, representing, and/or continuing to provide the impugned services to the general public and from communicating with members of the legal profession about the impugned services. Against the said application, the defendant contended, inter alia, the plaintiff's lack of substantive locus standi to bring this suit; the actions of the plaintiff was tantamount to enforcing a penal sanction under the LPA, a right under the Federal Constitution that was reserved to the attorney general; the plaintiff was

therefore acting ultra vires the objects and powers granted to it under the LPA; and that the plaintiff had suffered no loss or injury on its own.

Held, allowing the plaintiff's application with costs:

(1) The LPA which established the plaintiff has provided it with myriad and wide objects and powers. Section 42(1)(g) of the LPA is especially relevant as the plaintiff took the view that the activities of the defendant were against the provisions of s 37 of the LPA. By virtue of para (g) above, the plaintiff would be clothed with locus standi to bring about this action for the benefit and protection of an unsuspecting public (see paras 19 & 20).

(2) The plaintiff's action was not a criminal prosecution which would totally be within the purview of the public prosecutor. Instead, the plaintiff's action would appear to be founded on a belief that the defendant was breach of the provisions of the LPA and that such action by the plaintiff was necessary to protect and assist the public in relation to the impugned services that is or will be offered to an unsuspecting public, such services being legal services which would clearly fall within the phrase 'matters touching ancillary or incidental to the law' in s 42(1)(g) (see para 20).

(3) Whether the packages offered by the defendant would fall within the proviso of s 37(3), would be determined at trial and this would amount to a bona fide serious question to be tried. Thus, there were serious questions of law and fact in dispute between the parties. Further, greater harm will result if the implementation of the defendant's prepaid services scheme was allowed to proceed as this will involve an untold number of unsuspecting and gullible public. In all the circumstances of this case, the balance of convenience would tilt in favour of the plaintiff (see paras 27–30).

(4) In a case such as this, where the plaintiff was carrying out its statutory objects and powers with a view to protecting the public, the issue as to whether it had itself suffered losses becomes of secondary importance. The defendants were continuing to advertise the impugned services and this, if left unchecked may well lead to dire consequences for which damages would not be an adequate remedy. On the other hand, the plaintiff had given its undertaking as to damages as may be assessed or held to have been occasioned by the grant of the injunction in the event the court were later to hold that the injunction ought not to have been granted (see para 32).

[Bahasa Malaysia summary

Plaintif telah memohon antara lain, bagi suatu injunksi terhadap defendan berkaitan dengan aktiviti-aktivitinya dalam mempromosikan perkhidmatan undang-undang prabayar berasaskan langganan dengan nama '*answers-in-law*'.

Terdahulu, mahkamah telah memberikan injunksi ad interim untuk menghalang defendan daripada terus untuk mengiklankan, mempromosikan atau sebaliknya berkomunikasi walau bagaimana cara sekali pun peruntukan yang berupa perkhidmatan prabayar undang-undang ('perkhidmatan yang dipersoalkan'), daripada menjalankan dan/atau terlibat dalam penyediaan perkhidmatan yang dipersoalkan kepada orang ramai dan daripada mendapatkan pelanggan, ahli atau pelanggan secara langsung atau tidak langsung untuk skim *answers-in-law* melanggari s 37 Akta Profesion Undang-Undang 1976 ('APUU'). Walaupun adanya injunksi ad interim tersebut, defendan masih aktif dan terus menghantar mel elektronik kepada firma-firma guaman dan peguam-peguam individu bagi perkhidmatan yang dipersoalkan. Dengan itu, tindakan ini, oleh plaintif adalah untuk menghalang defendan daripada mengiklankan, mewakili, dan/atau berterusan menyediakan perkhidmatan yang dipersoalkan kepada orang awam dan daripada mengkomunikasikan mengenai perkhidmatan yang dipersoalkan kepada ahli-ahli profesion undang-undang. Bersandarkan permohonan tersebut, defendan menghujahkan, antara lain, ketiadaan lokus standi substantive plaintif untuk membawa tindakan ini; tindakan plaintif sama seperti menguatkuasakan membenarkan hukuman keseksaan di bawah APUU, suatu hak di bawah Perlembagaan Persekutuan khas untuk peguam negara; plaintif dengan itu telah bertindak ultra vires terhadap objek-objek dan kuasa-kuasa yang diberikan kepadanya di bawah APUU dan bahawa plaintif tidak mengalami kerugian atau kecederaan dengan sendirinya.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) APUU yang menubuhkan plaintif telah memperuntukkannya dengan objek dan kuasa yang pelbagai dan meluas. Seksyen 42(1)(g) APUU adalah secara khususnya, relevan kerana plaintif berpandangan bahawa aktiviti-aktiviti defendan adalah bertentangan dengan peruntukan-peruntukan s 37 APUU. Menurut perenggan (g) di atas, plaintif diselubungi dengan locus standi untuk membawa tindakan ini untuk faedah dan perlindungan orang awam yang tiada keraguan (lihat perenggan 19 & 20).

(2) Tindakan plaintif bukan pendakwaan jenayah yang sepenuhnya akan berada dalam bidang kuasa pendakwaraya. Sebaliknya, tindakan plaintif akan kelihatan diasaskan berdasarkan kepada kepercayaan bahawa defendan melanggar peruntukan-peruntukan APUU dan bahawa tindakan oleh plaintif adalah perlu untuk melindungi dan membantu orang awam berhubung perkhidmatan yang dipersoalkan iaitu atau akan ditawarkan kepada orang ramai yang tiada keraguan, perkhidmatan seperti perkhidmatan undang-undang yang jelas akan termasuk dalam frasa perkara yang menyentuh, berkaitan atau bersampingan dengan undang-undang dalam s 42(1)(g) (lihat perenggan 20).

(3) Sama ada pakej yang ditawarkan oleh defendan akan termasuk dalam proviso s 37(3) atau tidak, akan ditentukan ketika perbicaraan dan ini akan terjumlah soalan serius bona fide untuk dibicarakan. Oleh itu, terdapat persoalan undang-undang yang serius dan fakta yang dipertikaikan di antara pihak-pihak. Selanjutnya, ianya akan menyebabkan kerugian yang besar jika pelaksanaan skim perkhidmatan prabayar defendan dibenarkan untuk diteruskan kerana ini akan melibatkan bilangan yang diketahui, orang awam yang tiada keraguan dan mudah tertipu. Dalam semua hal keadaan kes ini, imbangan kemudahan akan cenderung memihak kepada plaintif (lihat perenggan 27–30).

(4) Dalam kes seperti ini di mana plaintif menjalankan objek berkanun dan kuasa-kuasanya dengan tujuan untuk melindungi orang awam, isu sama ada ia sendiri mengalami kerugian menjadi kepentingan kedua. Defendan terus mengiklankan perkhidmatan yang dipersoalkan dan ini, jika tidak dikawal boleh membawa kepada akibat buruk yang mana ganti rugi tidak akan menjadi remedi yang mencukupi. Sebaliknya, plaintif telah memberi jaminan kepada kerosakan yang boleh dinilai atau diputuskan telah disebabkan oleh pemberian injunksi sekiranya mahkamah kemudiannya memutuskan bahawa injunksi tersebut tidak sepatutnya telah dibenarkan (lihat perenggan 32).]

Notes

For cases on interlocutory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3544–3691.

Cases referred to

American Cynamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408; [1990] 1 CLJ (Rep) 30, SC (refd)

Bar Malaysia v HF Vitality (Malaysia) Sdn Bhd [2003] 5 MLJ 145; [2003] 1 CLJ 510, HC (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & 2 Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)

Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals [1997] 3 MLJ 23, CA (refd)

Majlis Peguam Malaysia & Ors v Raja Segaran Krishnan & Other Appeals [2005] 1 MLJ 15; [2004] 4 CLJ 239, CA (refd)

RHB Bank v L & R Holdings Sdn Bhd Anor [2011] 3 MLJ 162, CA (refd)

Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter [1992] 2 MLJ 689, SC (refd)

Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anor [1988] 2 MLJ 280 (refd)

Legislation referred to

Environmental Quality Act 1974
Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995
Federal Constitution
Legal Profession Act 1976 ss 36(1), 37(3), 41, 42(1)(g)

Sarawak Land Code (Cap 81)

Trevor George De Silva (Izalia Zainuddin with him) (Trevor George Partnership) for the plaintiff.
Loong Caesar (Tan Vei Chyi & Rehna Leec Perumal with him) (Raslan Loong) for the defendant.

Amelia Tee Abdullah J:

INTERPARTES APPLICATION FOR INJUNCTION

[1] The plaintiff, *Bar Malaysia*, had applied vide a writ of summons and statement of claim, for various declaratory reliefs and injunction against the defendant, *Index Continent Sdn Bhd* in connection with the latter's activities in promoting its prepaid legal services on a subscription basis by the name of 'answers-in-law'.

[2] On 29 November 2011, the court had granted an ad interim injunction in respect of prayers (i), (ii) and (iii) of the plaintiff's summons in chambers (encl 4) to restrain the defendant from continuing to advertise, promote or otherwise communicate howsoever its purported provision of prepaid legal services ('the impugned services'), from carrying and/or engaging in the provision of the impugned services to members of the public and from directly or indirectly soliciting clients, members or subscribers for its answers-in-law scheme in breach or s 37 of the Legal Profession Act 1976.

[3] In the affidavit in support ('encl 5') of the plaintiff's application for an injunction, Tony Woon Yeow Thiong, an advocate and solicitor of the High Court of Malaya and also the secretary of the plaintiff's Bar Council, had averred that even subsequent to the plaintiff's solicitors filing and serving of the present suit on the defendant, the latter was still actively and resolutely sending out electronic mails to law firms and individual lawyers on the impugned services. This was brought to the plaintiff's attention by members of the Bar.

[4] The plaintiff's writ of summons and statement of claim was filed on 10 October 2011. Yet, as late as 18 October 2011, electronic mail was still being sent out to, inter alia, invite subscription to answers-in-law as evidenced by exh TWYT3. As such, it was verily believed that if the defendant, its agents,

servants and/or employees are not restrained, they would continue with their actions and the breach of the Legal Profession Act 1976 would go unchecked. The plaintiff would thus be failing in its statutory duty if it did not file the present action or take such steps as are necessary to restrain the defendant from advertising, representing, and/or continuing to provide the Impugned services to the general public and from communicating with members of the legal profession about the impugned services. And, if an injunction is not granted, there is a real likelihood of serious and dire consequences especially to the gullible and unsuspecting public in general.

[5] The plaintiff contends that the activities of the defendant are in breach of the Legal Profession Act 1976 wherein the defendant, its agents, servants or employees, being not 'authorized persons' have acted and are still acting in breach of the said Act in that:

(a) they have, or are purporting to carry out their business and the impugned services as though the defendant is providing the services of advocate and solicitor of the High Court of Malaya in breach of s 36 of the Legal Profession Act 1976;

(b) they have, or are purporting to carry out and to advertise the impugned services as services, functions and/or duties that are normally and customarily carried out or undertaken by an advocate and solicitor of the High Court of Malaya in breach of s 36 of the Legal Profession Act 1976; and

(c) they have or are still offering or purporting to advertise their impugned se rvices to place at the disposal of the general public the services of advocates and solicitors for consideration in breach of s 37 of the Legal Profession Act 1976.

[6] In arguing against the grant of an injunction, the defendant has raised the issue of the lack of substantive locus standi on the part of the plaintiff to bring this suit. It argues that in the realm of public law, there are two kinds of locus standi, namely, initial or threshold locus standi and secondly, substantive locus standi. Threshold locus standi refers to the right of a litigant to approach the court in relation to the facts which form the substratum of his compliant and this should have been challenged by a striking out action, which was not done. And though a litigant may have threshold locus standi, he may, for substantive reasons, be disentitled to declaratory relief. This is substantive locus standi. The factors that go to a denial of substantive locus standi are various and wide ranging — from the nature of the subject matter to settled principles on the basis of which a court may refuse declaratory or injunctive relief.

[7] The defendant has cited the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* [1997] 3 MLJ 23 where the

Court of Appeal concluded that learned High Court judge was wrong in holding that there was substantive locus standi. The Court of Appeal held that the respondents who were attempting to stop an administrative action on the ground that the law had been infringed lacked substantive locus standi and denied them declaratory relief.

[8] The defendant had also argued that the actions of the plaintiff was tantamount to enforcing a penal sanction under the Legal Profession Act 1976 which right under the Federal Constitution is reserved to the attorney general. The defendant submits that the plaintiff's claim is based on an alleged breach of s 37 of the Legal Profession Act 1976 which states that anybody who breaches that section shall be guilty of an offence under that subsection. Learned counsel for the defendant had referred the court to the case of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 where the Supreme Court had held that where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy, the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by a declaration or by damages. It should be left to the attorney general to bring an action either of its own motion or at the instance of a member of the public who relates the facts to him.

[9] The defendant has also raised the issue of the plaintiff acting ultra vires the objects and powers granted to it under the Legal Profession Act 1976. The defendant submits that the plaintiff is a body corporate established under s 41 of the Legal Profession Act 1976. Reference was made to the case of *Majlis Peguam Malaysia & Ors v Raja Segaran Krishnan & Other Appeals* [2005] 1 MLJ 15; [2004] 4 CLJ 239 where His Lordship Richard Malanjum JCA (as he then was) had stated that:

> … the Bar Council and the Malaysian Bar are creatures of the LPA and as such they must act and conduct their activities within the four corners of the statute. That is a settled law applicable to any legal personality.

[10] Another point raised by the defendant is that the plaintiff has suffered no loss or injury on its own. It argues that the plaintiff must suffer some kind of injury of its own to warrant the grant of the relief sought. As the plaintiff had not pleaded any loss, damage or injury on its part and had clearly not suffered a loss or injury, that would make the remedy of a civil injunction inappropriate as there are no personal rights or property being threatened by the acts of the defendant.

[11] The defendant does not deny that they have a website or that they had sent out emails. It does not deny that it is providing a service that links advocates and solicitors with the general public or that it has published

materials relating to its services on the internet as well as in emails. However, what they are disputing is the plaintiff's interpretation of the contents of its website and the emails.

[12] The defendant contends that the plaintiff has misconstrued its intentions when it failed to consider the totality of the language and content of exh TWYT1 which was attached to the plaintiffs affidavit in support. It contends that nowhere in the exhibit does the defendant state that it is an advocate and solicitor or that it is itself providing the legal services. On the contrary, the extracts would show that the defendant was neither holding itself out as an advocate and solicitor nor was it providing legal services.

THE LAW ON INTERLOCUTORY INJUNCTIONS

[13] The law as regards the grant of an interlocutory injunction is well settled. In the Court of Appeal case of *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293, His Lordship Gopal Sri Ram JCA held as follows:

> … the correct approach to be adopted and the stages of reasoning involved in the process of arriving at the conclusion as to whether interlocutory injunctive relief should be granted or withheld are those that have been neatly summarized by Hashim Yeop Sani J, (as he was then) (in *Mohamed Zainuddin v Yap Chai Seng* [1978] 1 MLJ 40. This is what that very eminent judge said in that case (at p 42):
>
> Firstly to discover whether the plaintiffs case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits … Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The judge then considers the balance of convenience, and if the relevant factors were evenly balanced the court should grant an interlocutory injunction which would maintain the status quo. *It is said that at that stage the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.* (Emphasis added.)

[14] And in the Supreme Court case of *Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, Jemuri Serjan CJ (Borneo) observed that a judge hearing an application for an interim injunction should not, in his judgment, give the impression that he had in fact disposed off the main action on its merits.

[15] In the case of *Keet Gerald Francis*, His Lordship Gopal Sri Ram JCA had

laid down a step by step guide as to what should be considered when hearing an application for an interlocutory injunction:

> To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> first, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decide whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of the inquiry;
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> second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would provide by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief …
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> Thirdly, the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo … Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiffs equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.

[16] Another relevant decision to guide the court in coming to a decision is the case of *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408; [1990] 1 CLJ (Rep) 30 where the Supreme Court held that 'the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the court

acts upon the principle of preventing irreparable damage'.

THE DECISION

[17] In coming to a decision in this case, the court has adopted the approach so meticulously set out in *Keet Gerald Francis*. As a preliminary issue, the court has considered whether the plaintiff lacks substantive locus standi to bring this action as contended by the defendant.

[18] The court has carefully perused the decision in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ore and Other Appeals* where the Court of Appeal held that the respondents lacked substantive locus standi. The court is satisfied that the aforestated case can be easily distinguished from the facts of our instant case. In *Kajing Tubek*'s case, the respondents were natives of Sarawak who were in occupation near the area of Belaga in the Kapit Division of the State of Sarawak. The respondent and their ancestors had from time immemorial, lived upon and cultivated the said land in question. It was contended that the proposed Bakun Hydroelectric Project being constructed by Ekran would affect their livelihood and their way of life. The respondents thus applied for declarations that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 was invalid and that before Ekran could carry out the project, it had to comply with the Environmental Quality Act 1974. In finding that the respondents lacked substantive locus standi, the Court of Appeal found:

(a) that the respondents were in substance attempting to enforce a penal sanction which was a matter entirely reserved by the Federal Constitution to the Attorney General of Malaysia in whom resided the unquestionable discretion whether to institute criminal proceedings;

(b) that since the deprivation of the respondent's livelihood was in accordance with the law namely the Land Code of Sarawak (Cap 81), they had on the totality of the evidence suffered no injury and thus there was no necessity for a remedy; and

(c) there were persons other than the respondents who were adversely affected by the project and there was no special injury suffered by the respondents over and above the injury common to others.

[19] However, the plaintiff in the present case is not a rank outsider as were the respondents in *Kajing Tubek*'s case. Whist mindful of the decision of the Supreme Court in *Lim Kit Siang*'s case, the court is satisfied that the Legal Profession Act 1976 which establishes the plaintiff has also provided it with myriad and wide objects and powers. The objects of the Malaysian Bar can be seen in s 42 of the Legal Profession Act 1976. There are a total of 14 main objects and powers under sub-s 42(1) and an additional five powers under

sub-s 42(2) — too many reproduce here. The paragraphs which the court finds relevant for the purposes of our instant case are as follows:

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(1) The purpose of the Malaysian Bar shall be —

(a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour;

(b) …

(c) …

(d) …

(e) to represent, protect and assist members of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;

(f) …

(g) to protect and assist the public in all matters touching ancillary or incidental to the law;

[20] The court finds para (g) to be especially relevant as the plaintiff took the view that the activities of the defendant would be against the provisions of s 37 of the Legal Profession Act 1976. If so, then by virtue of para (g), the plaintiff would be clothed with locus standi to bring about this action for the benefit and protection of an unsuspecting public. Whilst it is true that contravention of s 37 brings about criminal sanctions, the court is not in agreement with learned counsel for the defendant that the plaintiff is usurping the powers of the attorney general in filing this action. The court notes that this is not a criminal prosecution which would totally be within the purview of the public prosecutor. Instead, the actions of the plaintiff would appear to be founded on a belief that the defendant is breach of the provisions of the legal profession Act 1976 and that such action by the plaintiff was necessary to protect and assist the public in relation to the impugned services that is or will be offered to an unsuspecting public, such services being legal services which would clearly fall within the phrase 'matters touching ancillary or incidental to the law'.

IS THERE A BONA FIDE SERIOUS ISSUE TO BE TRIED?

[21] In adopting the approach as set out in *Keet Gerald Francis*, the court has first considered whether the totality of the facts presented discloses a bona fide serious issue to be tried. In this regard, the court has considered all relevant materials including the submissions of both parties. And in coming to a decision, the court is mindful of the exhortations of the Court of Appeal that it must refrain from making any determination on the merits of the claim or any defence.

[22] The plaintiff avers that the defendant is an 'unauthorised person'. This is not disputed by the defendant. The plaintiff relies on two authorities in support of its contention that there are bona fide serious issues to be tried in this case. In the case of *Bar Malaysia v HF Vitality (Malaysia) Sdn Bhd* [2003] 5 MLJ 145; [2003] 1 CLJ 510, the defendant had advertised and sought to offer legal services to the general public under a scheme called 'The Rights Program', which services would be procured vide a membership fee. The plaintiff, contending that such services encroached into the legal profession of the country, applied for a declaration that the defendant was not authorised to provide such services under s 37 of the Legal Profession Act 1976 as well as an injunction to prevent the defendant from providing such services. The court found that the defendant had prima facie committed a breach of the Act and that its action was intolerable as it sought to provide services of a legal nature to the unsuspecting and gullible members of the public.

[23] The second authority submitted by learned counsel for the plaintiff is the Singapore case of *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anor* [1988] 2 MLJ 280. In that case, the Singapore Court had allowed an interim injunction against an American law firm which came within the category of 'unauthorised person' to be made permanent. The court held that the right to retain whomsoever they desire for their legal services in arbitration matters was now limited to a choice from amongst authorised persons where the dispute involves questions of law and legal rights and obligations.

[24] The defendant has denied the existence of bona fide serious issues to be tried. The defendant submits that it has never made itself out to be a person other than an 'unauthorised person' within the definition of s 36(1) of the Legal Profession Act 1976. Neither has it acted as advocates and solicitors within the prohibitive clauses of ss 37(1) and (2).

[25] The defendant further argues that even if its activities are broadly described as placing at the disposal of the public the services of advocates and solicitors, it does so within the narrow proviso of s 37(3) where the services offered is pursuant to a contract of indemnity or insurance. It was submitted that in the introductory email to Messrs Skrine enclosing the advertising materials, the defendant had repeatedly asserted that its service is 'a state-of-the-art, prepaid interactive legal and indemnity and directory service' and 'Our legal plans are offered at a cost that is substantially reduced and/or indemnified'. As such, the defendant contends that there is no bona fide serious question to be tried.

[26] The court has duly considered the arguments of both parties and finds that it is unable to agree with the defendant's submission on this issue. It is obvious that one of the issues to be tried would be whether the nature of the

services being offered by the defendant would contravene s 37(3) of the Legal Profession Act 1976. From a perusal of the defendant's emails and the contents of its website, it can be seen that the packages being offered by the defendant is multi layered in that potential members could, inter alia:

(a) call in for an immediate phone consultation;

(b) engage in web chat, presumably with an advocate and solicitor; or

(c) have a face to face consultation with an advocate and solicitor.

[27] The court is of the view that whether the packages offered by the defendant would fall within the proviso of s 37(3) would be determined at trial and this would amount to a bona fide serious question to be tried. The court is thus satisfied that there are serious questions of law and fact in dispute between the parties. That being so, the next step for the court to do is to consider where the balance of convenience lies.

WHERE DOES THE BALANCE OF CONVENIENCE LIE?

[28] It is the defendant's submission that the balance of convenience lies in its favour as the defendant would suffer substantial and unquantifiable losses if it is unable to implement its legitimate business. It may also suffer an unquantifiable loss in terms of goodwill.

[29] The plaintiff, on the other hand, has submitted that in this age of electronic media, the defendant is able to represent and communicate with the public at large as well as to the legal profession at large instantly pertaining to the impugned services which the plaintiff submits is in contravention of the Legal Profession Act 1976. It is the plaintiff's submission that pending the determination of these issues at trial, the balance of convenience lies in favour of granting the injunction sought. There would be a greater injustice caused if the relief sought is not granted as it involves the unsuspecting general public as well as members of the legal profession.

[30] After carefully considering the submissions of both parties on this issue, the court is of the view that the balance of convenience would tilt in favour of the plaintiff. The court has carefully weighed the harm that the grant of an injunction would cause as against the harm that would result if it were not granted. The court agrees with learned counsel for the plaintiff that the greater harm will result if the implementation of the defendant's prepaid services scheme is allowed to proceed as this will involve an untold number of unsuspecting and gullible public. In the final analysis, the court is of the considered view that in all the circumstances of this case, the balance of convenience would tilt in favour of the plaintiff.

A WOULD DAMAGES BE AN ADEQUATE REMEDY?

[31] And lastly, the court has considered the issue of whether damages would be an adequate remedy in this case. On this score, the defendant has submitted that the plaintiff has not made any claim that it will suffer damages. It drew the attention of the court to the case of *RHB Bank v L & R Holdings Sdn Bhd* [2011] 3 MLJ 162 as the authority for the proposition that the plaintiff was not entitled to an injunction when it has suffered no loss or damage. The court has perused the afore-cited authority but regret that it is unable to agree that that was what the Court of Appeal had decided. As the court sees it, the Court of Appeal in *RHB Bank* had only followed Lord Diplock in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 where he held as follows:

> If damages in the measure recoverable at common law would be adequate remedy and the defendants would be in a financial position to them no interlocutory injunction should normally be granted however strong the plaintiffs claim appeared to be at that stage.

[32] The court is of the considered view that in a case such as this where the plaintiff is carrying out its statutory objects and powers with a view to protecting the public, the issue as to whether it has itself suffered losses becomes of secondary importance. Instead what the court has considered is that the defendants are continuing to advertise the impugned services and this, if left unchecked may well lead to dire consequences for which damages would not be an adequate remedy. On the other hand, the plaintiff has given its undertaking as to damages as can be seen in para 20 of encl 5 where Tony Woon Yeow Thong, the secretary of the plaintiff, has clearly stated that he is authorized to provide the plaintiff's undertaking to pay such damages as may be assessed or held to have been occasioned by the grant of the injunction in the event the court were later to hold that the injunction ought not to have been granted.

CONCLUSION

[33] In conclusion, the court finds that the questions posed in *Keet Gerald Francis* have all been asked and answered. The court finds that there are bona fide serious questions of law and facts to be determined at the trial. The court further finds that the balance of convenience leans in favour of the plaintiff for the continued grant of an injunction against the defendant. And lastly, the court is satisfied that in the event that the defendant is successful, the quantum of damages would be an adequate remedy.

[34] Accordingly, the court hereby allows prayers (1) (i), (ii) and (iii) of the plaintiff's application in encl 4 with costs to be taxed, unless otherwise agreed between the parties.

Plaintiffs' application allowed with costs.

Reported by Ashgar Ali Ali Mohamed